AMENDING THE CONSTITUTION OF THE UNITED STATES

A REPLY TO MR. MARBURY[1]

THE provision for amending the Constitution is found in Article V. An examination of that article will disclose no purpose to draw any distinction between a proposed amendment that would take from the federal government some of its delegated powers and one which would take from the states some of their reserved powers. No effort was made to define the character of amendments that might be proposed and ratified. The outstanding features of Article V are these: No power was conferred upon the federal government to amend its Constitution. This power was reserved to the states themselves. The federal government had been created and clothed with powers surrendered or transferred by the states. These powers were not to be decreased or diminished except by the action of the states themselves. Naturally those administering the federal government would be in the best position to discover any defects or needed changes in the Constitution. The Congress of the United States was, therefore, authorized to propose amendments, but these were not to become effective unless made so by the states. An amendment, however, might be desired by states which would not be regarded as necessary by the Congress of the United States. And the states reserved to themselves a further power by providing that, upon the demand of the legislatures of two thirds of the states, Congress should call a convention for proposing amendments. Thus Congress was given the right to initiate amendments, but if it did not see fit to do so the states themselves reserved the right to initiate them.

The amendment of the Constitution, therefore, is distinctively an action by the several states, and not by the federal government. Every state in the Union is a party to the agreement that the Constitution may be amended in the manner provided in Article V. In entering into this agreement they might have stipulated that

[1] William L. Marbury, "The Limitations upon the Amending Power," 33 HARV. L. REV. 223.

no amendment should be made without unanimous consent, but, as suggested by Mr. Hamilton, there was no more reason why a small minority of the states should control in matters affecting the federal government than that a small minority of the people in any state should control in the affairs of that state. They might have agreed that the action of a majority of the states should make a proposed amendment effective, but the local interests of the various states were divergent, and were likely to become more so, and the states were, therefore, not willing to be bound, with respect to changes in the fundamental law of the land, by the action of a bare majority. As a compromise measure between these two extremes, it was accordingly agreed that ratification by three fourths of the states should be sufficient.

That the language used is equally applicable to an amendment which would restore to the states some of the powers previously delegated to the federal government, or to an amendment which would confer upon the federal government some of the powers previously reserved to the states, can scarcely be doubted.

The only security against the adoption of ill-advised or, if you please, revolutionary amendments is that, in the last analysis, the states themselves are the judges of the necessity for proposed amendments, and the action of three fourths of those states is required. No better security, however, could be devised. It is hardly conceivable that three fourths of the states will ever agree to a change in the fundamental law which will, to any essential extent, deprive a state of its sovereignty.

That the power to amend was intended to be as broad as above indicated, and to extend to every amendment regularly proposed which shall be ratified by the legislatures of three fourths of the states, is made even clearer when we examine the proviso to Article V. Section 9 of Article I contains two provisions which affected the subject of slavery. Slavery was even then a subject about which there were conflicting views. There were states particularly interested in seeing that it should not be disturbed by the new government which was being formed. The Constitution, in effect, treated it as a matter subject to state control, and therefore no power was conferred by which Congress could prohibit slavery in any of the states, but, under its power over imports and taxes, it could most seriously interfere with the institution of slavery.

The convention was not willing permanently to limit these powers of Congress, but, as a compromise, it was provided, in effect, that the importation of slaves should not be prohibited by Congress prior to the year 1808, and that no tax exceeding $10 per slave should be imposed on such importation. And it was also provided that no capitation, or other direct tax, should be laid unless in proportion to a census under which only three fifths of the slaves should be counted. And when Article V, providing for amendments, was under consideration, a proviso was added to the effect that no amendment should be adopted prior to 1808 which would affect these provisions. With one exception, there was no other matter which might possibly be the subject of an amendment which was excluded from the immediate operation of Article V. The exception was that no state should ever, without its consent, be deprived of its equal suffrage in the Senate.

With this enumeration of the matters which the convention thought necessary to withdraw from the amending power, it would seem to be impossible to infer an intention that any other restrictions were intended to be placed upon the character of amendments that might be adopted.

The views above expressed have been challenged in an article entitled "The Limitations upon the Amending Power," [2] recently published by William L. Marbury, of the Baltimore bar, who has advanced some ingenious arguments in support of the proposition that the prohibition amendment, recently adopted, and the proposed suffrage amendment are of such a nature as to be beyond the power to amend, and hence should be declared invalid by the court.

The Supreme Court has never said anything indicating the view that the courts could inquire into the validity of an amendment regularly proposed and ratified. Mr. Marbury frankly concedes that the objection he urges against the validity of the amendments now under consideration would, if seasonably made, have been equally effective against the Thirteenth and the Fifteenth Amendments. He thinks, however, that the court would not hold that, as an original proposition, the ratification by the legislatures of three fourths of the states made the Thirteenth and the Fifteenth Amendments a part of the Constitution, but that because no one

[2] 33 HARV. L. REV. 223.

saw fit to challenge their validity for forty-five years the court would be justified in treating this acquiescence by the people as the equivalent of a solemn action by a constitutional convention. In other words, while Congress has no power to propose, and the legislatures have no power to ratify, and their effort to do so is utterly void, yet their void acts will be given validity if some one does not challenge them in the courts for a long period of years. In short, void constitutional amendments become valid by prescription.

This theory introduces a startling innovation as to the means by which laws may be adopted. We have a government under which no act of Congress is valid or can have any effect unless authorized by the Constitution. The validity of every law must be tested by comparing it with the Constitution. The requirement that the Constitution shall be obeyed surely cannot be evaded by saying that a violation of constitutional provisions may become effective through the lapse of time.

As has been seen above, the Constitution committed to Congress, and not to the courts, the duty of determining what amendments were necessary. This was left expressly to the judgment of two thirds of the members of each house. The sole question, therefore, that could properly be submitted to any court is whether Congress has exercised its judgment in this regard. The power to do so is expressly committed to it, and the courts cannot inquire into the wisdom with which it has exerted this power. To say that the courts may strike down an amendment proposed and ratified in the regular way upon the ground that the amendment is unnecessary, unwise, or not one contemplated by the framers of the Constitution, would be to add to the provisions of Article V and make it read that an amendment proposed by Congress and ratified by three fourths of the states should be valid, provided it should be approved by the Supreme Court. In other words, it would be to substitute the judgment of the courts on a question of policy or expediency for the judgment of Congress and the legislatures of the states to whom the Constitution commits the matter. This would be wholly contrary to the entire theory upon which the powers of our government are distributed among coördinate branches. When the Court determines, as it must, that the power exists in Congress to propose any amendments which two thirds of the

members of each house deem necessary, judicial inquiry into the matter must terminate.

It is said that the power to amend the Constitution was not intended to include the power to destroy it, or to destroy the states composing the Union. But the federal government derives all its powers from the agreement of the states to surrender certain of the powers which they would have severally possessed if the Union had not been formed. The surrender of certain other powers, which experience has shown that it is desirable for the federal government to possess, is no more a destruction of the states than was the adoption of the original Constitution. Moreover, the question of whether a proposed amendment will destroy the states is one the authority to determine which must be vested somewhere, and, wherever vested, it will be subject to abuse.

From the standpoint of the states, then, the authority to determine such questions was placed where it would be less likely to be abused. The rights of the states would certainly be safer in the hands of three fourths of the states themselves than in the hands of any branch of the federal government. For this reason the states have not agreed that the federal courts may pass judgment upon what amendments may be adopted, but have reserved the ultimate authority in this matter to themselves. It is difficult to see how any safer plan for safeguarding the states against destruction through constitutional amendments could have been devised.

It is also said that if by successive amendments a state could be deprived of its legislative powers, it would cease to be the state which is guaranteed, by a limitation upon the amending power, equal representation in the Senate. In other words, if, by amendments, all the legislative power of the states should be taken away and the states destroyed, there would be no state to have equal representation in the Senate. Sufficient answer would seem to be that if the time should ever come when three fourths of the states would be willing to commit suicide by surrendering all of their legislative power, a condition will have arisen in which the public sentiment of the nation will have demanded an entirely new Constitution and a new government. But surely the fact that such a condition would result from depriving the states of all their powers is no reason for saying that it was never contemplated

that they should not, when experience showed the necessity for it, confer upon the federal government additional powers which could be exerted to a better advantage by the federal government than by the state government. Any governmental power, if carried to its extreme, will lead to absurd and disastrous results. If this is an argument against the existence of one power it is equally an argument against vesting power anywhere.

Finally, it is said that Article V was never intended to confer upon Congress the power to enact ordinary legislation in the manner proposed by the prohibition amendment. It is difficult to comprehend the refinement involved in this argument. The idea seems to be that it would be competent for an amendment to be adopted which would confer upon Congress the power to prohibit the liquor traffic, but that this result cannot be accomplished by making prohibition a part of the Constitution itself. In other words, the authority which can delegate this power to Congress cannot itself exercise such a power.

That the regulation or prohibition of the liquor traffic is a legitimate governmental function is not now questioned anywhere, and it has been time and again determined that the states may exercise this function through constitutional provisions, as well as by acts of the legislature. If the states can make such a rule of law a part of their own constitutions, there would seem to be no sound reason for saying that they cannot delegate the same power to the federal government by making the same rule of law a part of the Federal Constitution. Moreover, this amendment is no more legislation than any other provision or prohibition in the Constitution. It is precisely like the Thirteenth Amendment, which makes slavery unlawful throughout the United States. It simply incorporates into the Constitution a fundamental rule, and then expressly confers upon Congress the power, by legislation, to enforce it. It leaves Congress and the states to deal with the liquor traffic, but establishes for their guidance the general principle that that traffic shall be unlawful.

There is a striking analogy between the reasons which led to the adoption of the Thirteenth and the Eighteenth Amendments. Originally both slavery and the liquor traffic were lawful in all of the states. They were both regarded as matters which should properly be kept within the powers of the state. The legislation

in various states, on both subjects, differed widely. Slavery became the subject of bitter political controversy. Some states prohibited it, while others regarded it as a cherished institution. The time came when a large number of states demanded its abolition, and as a result of the Civil War those states which entertained the other view found themselves powerless to resist the demand. As a result the legislatures of three fourths of the states ratified an amendment which made slavery unlawful. If an amendment, ratified under the stress of these circumstances, is valid, there can be no question of the validity of the Eighteenth Amendment.

Agitation against the liquor traffic has been going on for years. It began in the various states, and state after state adopted prohibition until the liquor traffic was unlawful in a majority of the states. From the beginning, however, separate action by the states was beset with difficulties. In the first place, because the states had no power to regulate interstate commerce, it was held that no state could prohibit the sale, in original packages, of liquor shipped from another state. As the prohibition sentiment grew the federal government was appealed to, and sought to alleviate the defects. Congress, in the Wilson Act, gave the states the right to regulate sales in original packages. Later it passed the Webb-Kenyon law, which withdrew from the protection of the interstate commerce clause liquors being transported for use contrary to the laws of the state into which they were being transported. Still later, by the Reed amendment, Congress made it unlawful to transport in interstate commerce liquors into a state whose laws prohibited their manufacture or sale for beverage purposes. In this condition it was not unnatural that the conclusion should be reached that the subject was one which could be best dealt with by the federal government, and this led to the proposing and ratifying of the Eighteenth Amendment.

Unless all our ideas as to the rights of three fourths of the states to amend the Constitution of the United States are to be revolutionized, and unless the opinion which has prevailed and governed the practices of our government since the beginning have been entirely erroneous, the legislatures of three fourths of the states are clothed with the final and absolute power of determining whether an amendment regularly proposed is wise, desirable, or necessary. When this power has been exerted, as in the case of

the Eighteenth Amendment, there is no power in our government to prevent the amendment from becoming a part of the Constitution.

It is said that if the courts cannot pass upon a question of this kind, then the framers of the Constitution have failed in their efforts to establish and secure to their posterity forever the benefits of a perpetual union, by failing to clothe the Supreme Court of the United States with the power necessary to insure that perpetuity by preserving the integrity of the states. But the framers of the Constitution evidently felt that there was less danger of such a result to be anticipated from placing the power with the legislatures of three fourths of the states rather than with any number of individuals who might constitute the Supreme Court of the United States. At any rate, the Supreme Court clearly was not clothed with any such power. The Eighteenth Amendment has been proposed in the regular way, has received the approval of those bodies to whom alone has been committed the right to approve or disapprove, and its validity as a part of the Constitution is therefore not open to question in any court.

Wm. L. Frierson.

WASHINGTON, D. C.